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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re LUIS P., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS P.,

Defendant and Appellant.

F044036

(Super. Ct. No. JW101089-00)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe,
Judge.

Paul E. Lacy, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez, Kathleen A.
McKenna, and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Levy, J., and Gomes, J.

The trial court found that appellant, Luis P., was a person described in Welfare and Institutions Code section 602 after it sustained allegations charging Luis with attempted second degree burglary (Pen. Code, §§ 664/460, subd. (b)). On October 1, 2003, the court declared the offense to be a felony and placed Luis on probation. On appeal Luis contends: 1) the evidence is insufficient to sustain the court's finding that he committed the charged attempted burglary offense; 2) the evidence is insufficient to sustain the court's implicit finding that he understood the wrongfulness of his conduct; and 3) the court abused its discretion when it declared his offense to be a felony. We will find merit to Luis's first contention and reverse the judgment.

FACTS

Claudia Neri testified that on July 20, 2003, at approximately 8:30 p.m., she saw Luis and David S.¹ walking away from the bathroom window of apartment 7, an apartment that had been vacant for a month, and walk by her to apartment 24. It was still light outside at the time.

Shafter Police Officer Randy Milligan testified that on the day in question he went to apartment 7 and found some damage to the center and the left-hand side of the bathroom window that Luis and David had been seen walking away from. There was dirt on the damaged area except for the area on the middle left-hand side of the window where there were pry marks. Milligan also found some footprints by the window.

Milligan went to apartment 24 and spoke with Luis and David and each waived their *Miranda*² rights. Milligan asked David why he broke into apartment 7. David replied that he asked Luis if he wanted to check out an apartment that David knew was vacant and Luis said that he did. David then walked over to apartment 7 with Luis,

¹ At the time of this incident Luis was approximately 12 years 10 months old and David was approximately 16 years old.

² *Miranda v. Arizona* (1966) 384 U.S. 436.

pulled out a knife, and attempted to pry open a bathroom window. David was not able to open the window and quit trying after noticing that the window was already damaged. Milligan further testified that he looked into the apartment from where the entrance door was located (on the opposite side of the apartment)³ and saw a small television, a toolbox, construction material, large and small boxes, and miscellaneous items.

Milligan interviewed Luis prior to reading him his *Miranda* rights. Luis stated that he and David were at David's grandmother's apartment (apartment 24) discussing how bored they were when David told him about a vacant apartment and asked Luis if he wanted to go inside. Luis agreed because he wanted to look around the apartment. David then took a butcher knife from the kitchen and the boys went to the vacant apartment. Afterwards they returned to apartment 24.

At the conclusion of the prosecution case the court denied defense counsel's motion to dismiss. Afterwards, David testified that he was visiting his grandmother and knew apartment 7 was empty because he had looked inside when he walked by it on the sidewalk. According to David he did not actually attempt to open the bathroom window because he saw some markings there. He and Luis were unable to look into the apartment through the bathroom window because it was opaque, so they looked into a bedroom window next to it and saw that it was empty. They spent less than five minutes by the window.

After hearing counsel's arguments, the court sustained the attempted burglary charge against both minors.

³ The bathroom window Luis and David attempted to enter faces the street. The entrance to the apartment is on the opposite side of the apartment in the apartment complex courtyard.

DISCUSSION

The Sufficiency of the Evidence

Luis contends the evidence is insufficient to sustain the court's finding that he committed the charged attempted burglary offense because it failed to establish that he attempted to enter apartment 7 with the intent to commit a theft or any felony. We agree and reverse the judgment.

“Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.] The standard of review is the same in cases such as this where the People rely primarily on circumstantial evidence. [Citation.] ‘Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the [trier of fact], not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ [Citation.]” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

“In order to be guilty of burglary, an individual must unlawfully enter a dwelling with the intent to commit a theft or any felony. [Citations.] A necessary element to this crime is that the intent to commit the theft or felony must exist at the time of entry. [Citation.] However, in reviewing the sufficiency of evidence to support a burglary finding, the requisite intent is rarely demonstrated by direct proof, and as a result, may be inferred from facts and circumstances. [Citation.]” (*In re Leanna W.* (2004) 120 Cal.App.4th 735, 741.)

Our review of the record did not disclose any circumstances from which the court could reasonably infer that, in attempting to enter apartment 7, Luis did so with the requisite intent to commit a theft or a felony. Apartment 7 had been vacant for a month when Luis and David attempted to enter it. Further, when interviewed by Officer Milligan, David stated that he invited Luis to enter the apartment simply to “check it out.” Luis told Milligan that they were bored being at David’s grandmother’s home and when David suggested that they enter apartment 7, which they knew was empty, to look around he agreed. Moreover, his claim that he attempted to enter the vacant apartment out of curiosity simply to look around does not appear unusual given his youthful age, especially since the record does not disclose any suspicious circumstances. As to this latter point we note that the boys attempted to enter the apartment while it was still daylight, they gave up quickly when David could not pry the window open, they did not run away afterwards, and they did not attempt to hide their identities from witness Neri. Further, Luis was cooperative with Officer Milligan candidly admitting that he and David attempted to enter the apartment because they were bored and wanted to look around, and he voluntarily waived his *Miranda* rights.

In *People v. Jordan* (1962) 204 Cal.App.2d 782, the court stated that entry through a window without a reasonable explanation is sufficient for a trier of fact to conclude that the entry was made with the intent to commit a theft. (*Id.* at pp. 786-787.) Respondent cites this statement in *Jordan* to contend that the court here could reasonably have inferred from Luis’s attempt to enter apartment 7 through a bathroom window, that he did so with the intent to commit a larceny. We disagree.

Jordan is not controlling here because: 1) Luis provided an explanation for attempting to enter apartment 7 which we find reasonable in light of Luis’s youthful age; 2) the attempted entry was not accompanied by any suspicious circumstances; and 3) Luis’s conduct following the failed attempt to enter the apartment did not reflect a

consciousness of guilt and was consistent with his stated innocuous purpose in attempting to enter the apartment.

Respondent also contends that the court could have inferred the requisite intent to commit a theft from the presence of a TV, a toolbox and other unidentified items in the apartment. However, the items were in a portion of the apartment that was apparently visible through a window by the entrance to the apartment, which was located on the opposite side from where the bathroom window was located. Further, there was no evidence that Luis or David were able to see these items through the bedroom window located next to the bathroom where the boys attempted to enter or that they were otherwise aware that these items were in the apartment. In any event, even if they had been aware that these items were in the apartment, in the absence of any suspicious circumstances, the mere presence of these items in the apartment does not reasonably lead to an inference that the boys intended to enter the apartment to steal them. Accordingly, we find the evidence insufficient to sustain the court's finding that Luis committed an attempted burglary.

DISPOSITION

The judgment is reversed.⁴

⁴ In view of our decision to reverse the judgment on sufficiency of evidence grounds we will not discuss the other issues Luis raises.